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DISTRICT II

September 13, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2017AP775-CRNM State of Wisconsin v. Gerald W. Devoe (L.C. # 2014CF353)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Gerald W. Devoe appeals from a judgment of conviction for child enticement. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Devoe received a copy of the report, was

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Devoe was charged with first-degree sexual assault of a child under age thirteen after a five-year-old child sharing a household with Devoe reported that, in June 2014, Devoe removed her pants and underwear and touched her vaginal area with his hand. During the pendency of the case, Devoe was evaluated to determine whether he was competent to proceed. Devoe did not challenge the report that he was competent. Devoe entered a no contest plea to the amended charge of child enticement. The plea agreement called for a joint sentencing recommendation of four years' probation with one year jail time imposed and stayed. The State also agreed to waive the preparation of a presentence investigation report (PSI). After accepting Devoe's plea, the trial court ordered a PSI. Devoe refused to participate in an interview with the PSI author. Prior to sentencing, Devoe moved to withdraw his plea. He alleged that because the trial court asked him during the plea hearing whether there was any reason why the court should not accept a plea and impose sentence that day, he was confused about the trial court's willingness to adopt the joint recommendation and proceed that day to impose a sentence which would have resulted in Devoe's release.[2] The trial court denied the motion for plea withdrawal finding that there was no

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[2] The motion argued:

> The defendant believed the joint recommendation was set in stone and the plea colloquy by the Court solidified this belief. The defendant was confused as to why a pre-sentence report was ordered and why he was not getting out of jail that day. The defendant was also confused about the [WIS. STAT. ch.] 980 discussion.

basis for confusion because the court had made it clear during the plea colloquy that it was not bound by the joint recommendation. Thereafter, Devoe was sentenced to one and one-half years' initial confinement and five years' extended supervision, and granted 463 days of sentence credit.

The no-merit report reflects counsel's examination of the criminal complaint, initial appearance, representation by counsel, preliminary hearing, information, arraignment, competency evaluation and hearing, motions to suppress evidence, Devoe's statement, and to admit the victim's prior false accusation which were withdrawn or not litigated because of the entry of the no contest plea, plea taking, PSI, motion to withdraw the plea, victim impact statements, Devoe's allocution at sentencing, sentence credit, determination that Devoe was not eligible for the Challenge Incarceration or Substance Abuse Programs, and that the judgment of conviction properly reflects the sentence imposed. The report specifically addresses the potential issues of whether Devoe's plea was freely, voluntarily, and knowingly entered, including whether a factual basis for the conviction existed,[3] whether the denial of the plea withdrawal motion was a proper exercise of discretion, and whether the sentence was the result of an erroneous exercise of discretion, unduly harsh or excessive, or based on inaccurate information. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

[3] The criminal complaint alleged that the child was in her room when Devoe entered and assaulted her. The factual basis for the enticement element of causing the child to go into a room or secluded place was established by Devoe's admission that he caused the child to come into a room or secluded place for the purpose of having sexual contact with her. Devoe denied that he had actual contact with the child.

We note that at sentencing the trial court mentioned a 2013 COMPAS[4] assessment that was included with the PSI. In doing so, the court simply observed that the assessment generated instabilities which concerned the PSI author. The COMPAS assessment was observed only as to how it impacted the PSI recommendation. The COMPAS assessment was not "determinative" of the sentence imposed. *See* ***State v. Loomis***, 2016 WI 68, ¶¶98, 104, 371 Wis. 2d 235, 881 N.W.2d 749 (a circuit court's consideration of risk scores of a COMPAS assessment does not violate a defendant's right to due process when not used to determine whether an offender should be incarcerated, the severity of the sentence, or whether an offender can be supervised safely and effectively in the community). The mention of the COMPAS assessment does not give rise to any issue of arguable merit.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Devoe further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Erica L. Bauer is relieved from further representing Gerald W. Devoe in this appeal. *See* WIS. STAT. RULE 809.32(3).

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[4] "'COMPAS' stands for 'Correctional Offender Management Profiling for Alternative Sanctions.'" ***State v. Loomis***, 2016 WI 68, ¶4 n.10, 371 Wis. 2d 235, 881 N.W.2d 749.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals